



A.S. (MD) No.117 of 2021

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 30.03.2023

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

**A.S. (MD) No.117 of 2021
and
C.M.P. (MD) No.3468 of 2023**

Mr.K.N.Rajaiyan (Died)
2.Vasanth
3.Vijayalakshmi
4.Indira Gandhi
5.Senthilkumar
6.Bhavani

... Appellants

Vs.

U.M.Umapathi
2..Shanthi
3.Punithavalli
4.K.Saravanan

... Respondents

(Appellants 2 to 6 and the respondents 2 to 4
are brought on record as legal heirs of the
deceased sole appellant vide Court Order
dated 26.03.2021)



A.S. (MD) No.117 of 2021

WEB COPY

PRAYER: Appeal Suit filed under Section 96 r/w Order 41 Rule 1 of the Civil Procedure Code, 1908, to set aside the decree and judgment dated 23.11.2015 passed in O.S.No.37 of 2013 by the Principal District Judge, Thanjavur and to dismiss the suit with costs.

For Appellants : Mr.P.Sesubalan Raja
For R1 : Mr.P.Vadivel
For R2 to R4 : Mr.A.Ramesh

J U D G M E N T

This Appeal Suit has been preferred challenging the judgment and decree of the learned Principal District Judge, Thanjavur, dated 23.11.2015 made in O.S.No.37 of 2013.

2. The defendant is the appellant in the above said appeal. The respondent is the plaintiff.

3. The plaintiff filed a suit against the defendants in O.S.No.37 of 2013, on the file of the Principal District Court, Thanjavur for specific



A.S. (MD) No.117 of 2021

performance and for an alternative relief of refund of the advance amount of Rs.7,00,000/-. The trial Court allowed the main relief of specific performance. Now, challenging the said judgment and decree, the defendant has filed the present appeal before this Court.

4. The case of the plaintiff is that the defendant had agreed to sell the suit property for a total sum of Rs.12,00,000/- and executed a sale agreement on 29.08.2011. The defendant received a sum of Rs.7,00,000/- as advance on three occasions from the plaintiff. The time fixed for the sale agreement is 6 months, however, the time is not essence of the contract. The plaintiff is all along ready and willing to perform his part of contract. However, the defendant has evaded to execute the sale deed. Hence, the plaintiff has issued a legal notice on 29.03.2013 calling upon the defendant to perform his part of contract of the sale agreement. The defendant has sent a reply notice on 10.04.2013 with false averments, therefore, the plaintiff has filed a suit.



A.S. (MD) No.117 of 2021

WEB COPY

5. It is the contention of the defendant in the written statement that the agreement was never intended to sell the property. The defendant's son is doing Silk Saree business. The plaintiff is a money lender. Therefore, the son of the defendant borrowed a sum of Rs.2 lakhs for his sister's marriage. Due to that, an agreement came to be executed towards loan transaction in favour of the plaintiff.

6. On the basis of the above pleadings, the learned trial Judge framed the following issues for consideration:

“1) Whether the suit sale agreement entered between the parties, as contended by the defendant?

2) Whether the defendant is the absolute owner of the entire suit property?

3) Whether the plaintiff is entitled for the relief of specific performance of contract, as prayed for?

4) Whether the plaintiff is entitled for the alternative relief as prayed for?

5) What other reliefs, the plaintiff is entitled to?”



A.S. (MD) No.117 of 2021

10.04.2013 which itself clearly shows that the plaintiff is not ready and willing to perform his part of contract. Further, the evidence available on record show the the Plaintiff was not capable of mobilizing the fund to pay the remaining sale consideration. Therefore, without showing the readiness and willingness on the part of the plaintiff, he is not entitled to the relief of specific performance.

10. The learned counsel for the respondent would submit that once the appellant has taken plea of loan transaction and the same is not established since the agreement registered once, the trial Court has properly analyzed the entire evidence and granted a decree.

11. The learned counsel appearing for the respondent would submit that pursuant to the decree granted by the trial Court, remaining amount was also deposited before the trial Court on 15.07.2016.

12. In the light of the above, the points that arose for consideration are:-



A.S. (MD) No.117 of 2021

WEB COPY

(i) whether the agreement for sale is not intended for the sale of suit property?

(ii) Whether the plaintiff has proved his readiness and willingness to perform his part of contract, if so, whether he is entitled to the relief of specific performance?.

13. On a perusal of Ex.A1 a registered sale agreement entered on 29.08.2011 between the plaintiff and the defendant for sale consideration of Rs.12,00,000/- and Rs.7,00,000/- said to have been paid as advance and the time has been stipulated to complete the sale within 6 months. As far as the immovable property is concerned, though the time is not the essence of contract, generally, the parties to contract still make the time as an essence of contract to complete the transaction within stipulates time. Such stipulates time agreed between parties cannot be ignored altogether. Terms agreed between parties fixing the time limit is relevant to assess the readiness and willingness on the part of the parties to contract.



A.S. (MD) No.117 of 2021

WEB COPY

14. Though the contention of the appellant is that there was a loan transaction, Ex.A1 was never intended for the sale of property and such contention has not been established by letting any evidence or bringing probabilities on record.

15. Therefore, once the registered agreement placed on record, the defendant without any evidence to show that there was other oral evidence existing between the parties and the document was never intended for sale, the defendant cannot succeed in proving his contention.

16. Be that as it may, merely because the stand of the defendant has not been established that will not absolve the plaintiff from proving readiness and willingness in seeking equitable relief of specific performance. Having paid a sum of Rs.7,00,000/- as advance on the agreement date. Plaintiff has not taken any active steps to prove his readiness and willingness within the period of six months agreed in the agreement. The evidence of P.W.1 show that he never shown his readiness



A.S. (MD) No.117 of 2021

and willingness from the inception of the contract. Having agreed to complete the sale within a period of 6 months, for the first time, the plaintiff has issued a legal notice Ex.A2 on 29.03.2003 and thereafter had filed the suit. Even during the pendency of the suit, he has not shown his readiness and willingness to pay balance sale consideration. If really the plaintiff intended to purchase the property he would have taken some steps to pay the balance sale consideration. Further, to show that he has ready cash or capacity to mobilize the balance sale consideration, no documents or evidence placed on record. Therefore, in the absence of evidence to show that he had the capacity to mobilise the funds, the equitable relief cannot be granted mechanically, unless readiness and willingness is established on record. It is further to be noted that the plaintiff has sought to explain the delay in filing the suit, only for the first time in the cross-examination taking advantage of the fact that same bravement happened in the defendant family. This fact was never whispered in his pleadings and also in the legal notice. Therefore, the plaintiff attempt to explain the delay for the first time during trial will not prove readiness and willingness.



A.S. (MD) No.117 of 2021

WEB COPY

17. It yet another fact cannot be altogether, though the suit was decreed on 23.11.2015 and one month time is granted to complete the same. The remaining sale consideration was not paid within a month and the said amount has been deposited only on 15.07.2016 with an inordinate delay and no permission whatsoever has been obtained from the Court for the extension of the period to deposit the remaining sale consideration.

18. The amount has not been deposited as ordered by the Court, such situation even lead to recind the contract at the instance of the party under Section 28 of the Specific Relief Act.

19. Such being the position, the plaintiff merely on the basis of the registered document having slept over for years together without making any efforts to find the nature of the property or at least to verify the extent of the property cannot now contend that he was ready and willing to purchase the property. No steps whatever taken by the plaintiff to identify or



A.S. (MD) No.117 of 2021

demarcate the suit property. All these conduct of the plaintiff clearly show that he never ready and willing to perform his part of contract.

20. Accordingly, this Court is of the view that the property sought to be sold is only a residential house and the appellant along with family members residing there and the evidence of the P.W.1 and the partition deed Ex.P4 show that the ancestral property others also has share and if the specific performance is granted it will also cause undue hardship again the other legal heirs, who are entitled in the property.

21. Such view of the matter, this Court is of the view that if the specific performance is granted, it will cause undue hardship to the other legal heirs also.

22. In such view of the matter, granting specific performance in this case is not proper. However, taking note of the fact that alternative relief of refund of advance amount of Rs.7,00,000/- is also prayed. The plaintiff is entitled for refund of the advance amount with interest at the



A.S. (MD) No.117 of 2021

rate of 9% from the date of agreement till the date of realization.

23. It is stated by the learned counsel for the respondent that he has already deposited the remaining sale consideration before the trial Court, he may be permitted to withdraw that amount. The respondent may withdraw that amount from the trial Court by filing proper application.

24. In the result, the Appeal is partly allowed and the decree and judgment of the trial Court granting the relief of specific performance is set aside and the suit is decreed for alternative relief for refund of advance amount of Rs.7 lakhs with interest at the rate of 9% from the date of agreement till the date of realisation. No costs. Consequently, connected miscellaneous petition is closed.

30.03.2023

Index : Yes / No

Speaking Order : Yes / No

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A.S. (MD) No.117 of 2021

WEB COPY

To

1. The Principal District Judge,
Thanjavur.
2. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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A.S. (MD) No.117 of 2021

N.SATHISH KUMAR, J.

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A.S. (MD) No.117 of 2021

30.03.2023